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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1925

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,

Petitioner,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY,

Respondents.

MOTION OF FRED A. MAUCK, DIRECTOR OF INSURANCE, STATE OF ILLINOIS, AS LIQUIDATOR OF HOME OWNERS INSURANCE COMPANY, FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS.

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NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY,

Respondents.

MOTION OF FRED A. MAUCK, DIRECTOR OF INSURANCE, STATE OF ILLINOIS, AS LIQUIDATOR OF HOME OWNERS INSURANCE COMPANY, FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

Fred A. Mauck, Director of Insurance of the State of Illinois and statutory Liquidator of Home Owners Insurance Company (herein "Liquidator"), respectfully moves the Court, pursuant to Rule 42(3) of the Rules of this Court, for an Order granting this Applicant leave to file the attached Brief Amicus Curiae in support of Respondents. In support of his Motion, Applicant states:

1. He is the Director of Insurance of the State of Illinois and is the duly appointed, qualified and acting statutory Liquidator of Home Owners Insurance Company, the insolvent surety company reinsured by the Respondents.

2. His predecessor in interest, James A. Baylor, was the prior Liquidator of Home Owners Insurance Company and was a party in the three (3) companion cases consolidated for hearing and argument before the Court of Appeals for the Seventh Circuit. The prior Liquidator was amicus curiae by consent of the litigants in the instant case in the court below.

3. His predecessor in interest is a party, as Liquidator of Home Owners Insurance Company, in the five cases now pending in the United States District Court, Southern District of Indiana, which involve the identical Indiana statute as that now before this Court in the instant case.

4. He represents the general creditors and interests of the insolvent Reinsured and has a primary interest in the reinsurance proceeds sought to be recovered by the Petitioner in the case now before the Court.

5. He is concerned that this case might be disposed of or decided without careful consideration of the following important questions of law which are relevant for this Court to consider in determining whether to accept certiorari:

(a) Whether or not this Court should vacate the judgment of the Court of Appeals for the Seventh Circuit and remand the case for reconsideration as to whether the controlling issue of Indiana law should be certified to the Supreme Court of Indiana pursuant to Indiana Appellate Rule 15(N) in view of the fact that an able and experienced circuit judge of the circuit which includes Indiana and of three capable district judges trained in Indiana law construed an Indiana statute not previously interpreted.

(b) Whether or not it may be properly inferred that the Court of Appeals for the Seventh Circuit did not consider the question of certification procedures to the Supreme Court of Indiana even though Petitioner presented the certification issue in its brief and oral

argument and in its petition for rehearing before the Court of Appeals.

(c) Whether or not Petitioner may seek review of the judgment below by Petition for Writ of Certiorari when it obviously did not comply with the requirement of a state statute under which it proceeded that required joinder of the Reinsured and the Reinsurers.

(d) Whether or not Petitioner's argument that the Reinsured is not an indispensable party presents a justiciable issue for consideration by this Court in view of the Court of Appeals decision and judgment that the Petitioner's cause of action under the statute abated at the time of commencement of insolvency proceedings against the Reinsured.

(e) Whether or not the Memorandum of Decision and Order of the District Court did, in fact and in law, apply Rule 19 factors, as interpreted in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), to the instant case.

6. The Respondents, Northeastern Insurance Company of Hartford, Nationwide Mutual Insurance Company, and Allstate Insurance Company, by their counsel, have consented to the filing of a brief by this Applicant. Petitioner has declined to consent to this proposed Brief Amicus Curiae.

Respectfully submitted,

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Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS.

The nature of the interest of Amicus Curiae is stated in the attached Motion for Leave to File Amicus Curiae Brief, and is incorporated herein.

SUMMARY OF THE ARGUMENT.

I.

The factors and circumstances which led this Court to remand and vacate the lower court's judgment in *Lehman Brothers* v. *Schein*, ... U.S. ....., 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974) are not present in the instant case because (1) able and experienced jurists, knowledgeable in Indiana law, considered the case below and (2) the analysis of I. C. 1971, § 27-1-13-6

(Burns § 39-4307) (herein "§ 4307") by the Court of Appeals comports with the standards set forth in *Lehman Brothers* v. *Schein, supra,* pertaining to the scope of discretion of courts in deciding whether to utilize state certification procedures.

II

It cannot be properly inferred that the Court of Appeals for the Seventh Circuit did not consider the utilization of certification procedures under Indiana Appellate Rule 15(N) in view of the fact that Petitioner specifically presented its position to the Court on the certification question in its brief on appeal, in oral argument and in its petition for rehearing. An inference of abuse of discretion cannot be drawn under such facts.

III.

Petitioner cannot claim rights purportedly conferred by statute, and not known at common law, when Petitioner has failed to comply with the procedural and substantive requirements of the statute. Petitioner's failure to sue the statutory successor in interest to the Reinsured jointly with the Reinsurers and to first obtain judgment against the Reinsured is fatal to its alleged remedy under § 4307.

IV.

Petitioner has not presented a justiciable issue for consideration by this Court because the decision and judgment of the Court of Appeals for the Seventh Circuit renders moot and premature the issue of whether the statutory Liquidator of the reinsured is an indispensable party under Rule 19 of the Fed. R. Civ. P. The Court of Appeals did not have to reach the question, as this Court does not, as to whether the Liquidator was an indispensable party in view of its holding that Petitioner's "direct rights" of action against the Reinsurers abated upon commencement of insolvency proceedings against the Reinsured.

V

The Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana, which dismissed without prejudice the Petitioner's Complaint against the Reinsurers did, in fact and in law, consider and apply the Rule 19 factors, as interpreted in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), to the case at bar; therefore, there is no conflict between the District Court's decision and this Court's pronouncement in *Provident*. Furthermore, there is no conflict between the decision of the Court of Appeals and *Provident* because the Rule 19 issue did not require adjudication in view of the Court of Appeals decision that Petitioner's purported "direct rights" had abated prior to the commencement of suit.

ARGUMENT.

I.

THE FACTORS AND CIRCUMSTANCES WHICH LED THIS COURT TO REMAND AND VACATE THE LOWER COURT'S JUDGMENT IN LEHMAN BROTHERS v. SCHEIN ARE NOT PRESENT IN THE INSTANT CASE.

A. The Instant Case Was Decided by Able Jurists Knowledgeable in Indiana Law.

Petitioner asserts that a Writ should be granted by this Court to vacate the judgment of the Court of Appeals for the Seventh Circuit and that the case should be remanded for reconsideration as to whether the controlling issue of Indiana law should be certified to the Supreme Court of Indiana in light of this Court's decision in *Lehman Brothers* v. *Schein*, ... U. S. ....., 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974). Applicant submits that the instant case contains entirely different factors and considerations than those which led to the vacation of the judgment by this Court in *Lehman Brothers* v. *Schein, supra.* Those factors and considerations were:

1. The controlling Florida law question was determined by New York jurists not trained in or acquainted with Florida law, what this Court referred to as "outsiders."

2. "Outsider" New York jurists determined that the Florida Supreme Court would "most probably" extend the substantive law of officer-director "insider" liability even beyond New York's substantive law announced in *Diamond* v. *Oreamuno*, 24 N. Y. 2d 494, 301 N. Y. S. 2d 78, 248 N. E. 2d 910 (1969), a decision which Mr. Justice Rehnquist described as "apparently novel".

The *Lehman* factors and considerations are wholly absent in the case now under consideration on Petitioner's Petition for Writ of Certiorari. Consider the following factors, present in the instant case, with those factors present in *Lehman*:

1. Although the Court of Appeals for the Seventh Circuit affirmed the dismissal order below on other grounds, the original order of dismissal was considered and decided by the Hon. Jesse E. Eschbach, an able and respected lawyer, trained in Indiana law, who served on the editorial staff of the Indiana Law Journal from 1947 to 1949; who was admitted to practice before the highest Court of the State of Indiana in 1949; had practiced law in Warsaw, Indiana, from 1949 to 1962; was the Warsaw City Attorney from 1952 to 1953; was a Deputy Prosecuting Attorney for the 64th Judicial Circuit of Indiana from 1952 through 1954 and was appointed to the Federal Bench in 1962, where he has served until the present.[1]

2. The State of Indiana is a State within the Seventh Circuit.

3. The panel of judges for the Court of Appeals for the Seventh Circuit included Senior District Judge Robert A. Grant of the Northern District of Indiana, another able and well experienced Indiana lawyer and jurist.

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1. *Who's Who in America*, p. 941, 37th ed., Marquis Who's Who, Chicago, 1973.

4. This case involves the original interpretation of an Indiana statutory provision, quite distinguishable from the question presented in *Lehman*, i.e., whether the Supreme Court of Florida would *extend* the substantive law of New York pertaining to insider fiduciary liability, a theory characterized by Mr. Justice Rehnquist as "apparently novel".

Applicant respectfully submits that the instant case and *Lehman Brothers* have but one common factor, the original interpretation of state law by a federal district court sitting in a diversity case. The existence of this singular factor should not result in the grant of certiorari. As stated in *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943), at p. 234 of 320 U. S.:

> "In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. (Citations omitted.) When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have *not yet been given by the highest court of the state*, would thwart the purpose of the jurisdictional act." (Emphasis supplied.)

Petitioner chose the federal forum and presumptively had knowledge that the Indiana statute had not been previously construed. Therefore, Petitioner should be bound by the federal courts' judgment, especially in a case, such as that before the Court, where utilization of certification procedures would not be especially appropriate.

B. The Analysis of the Statutory Provisions in Question by the Court of Appeals Comports with the Standards Set Forth in Lehman Brothers v. Schein Pertaining to the Scope of Discretion of Courts in Deciding Whether to Utilize State Certification Procedures.

Mr. Justice Rehnquist, in his concurring opinion in *Lehman Brothers*, alluded to the scope of discretion of federal judges in deciding whether to use state certification procedures. At 194 S. Ct. 1745-46 he stated:

> "But a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we *go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship*, cases which they see and decide far more often than we do.
>
> * * * * *
>
> "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, *and makes the effort to do so*, its determination *should not be disturbed* simply because the certification procedure existed but was not used." (Emphasis supplied.)

It is obvious that the Court of Appeals made the effort to resolve the issue of state law with available research material at hand. In arriving at its conclusion that § 4307 does create direct rights of action by bond obligees against the reinsurers but that such direct rights abate upon the commencement of insolvency proceedings against the reinsured, the Court of Appeals stated:

> "When the General Assembly enacted the 1935 Indiana Insurance Law, it disfavored granting preferences in assets of insolvent insurance companies. Thus, Section 37(b) of the 1935 law, now Ind. Code § 27-1-4-9 (Burns § 39-3409(b)), provides that an Indiana liquidation court may issue any orders necessary to prevent the obtaining of any

preferences against any part of the assets of an insolvent insurance company. Similarly, Section 38, now Ind. Code § 27-1-4-10 (Burns § 39-3410), provides that if an insurance company is in liquidation in Indiana, no suit can be maintained against the Company outside the liquidation proceedings. Since Section 4307 specifies that the reinsurer be sued jointly with the insurer, Section 3410 would prevent any suit under an agreement minimally complying with Section 4307, once Indiana liquidation proceedings had begun. We do not believe a different result was intended when the liquidation proceeding takes place outside Indiana.

"When the legislature intended to grant a preference, it did so explicitly, as in Section 43 of the 1935 Act, now Ind. Code § 27-1-4-15 (Burns § 39-3415), which provides that certain wage claims 'shall be paid prior to the payment of every other debt or claim***'. We conclude that if the Indiana insurance law were intended to give claimants a preference in the assets of an insolvent insurance company, the statutory expression would have been equally explicit. Our determination that there is no preference leads to the conclusion that the direct cause of action does not survive the commencement of liquidation proceedings." (Pet. Br. Appendix A9-10)

The observation by the Court of Appeals to the effect that, at the time of legislative enactment of § 4307, it was not the public policy of Indiana to grant preferences to creditors of insolvent insurance companies is aptly supported by the Indiana Supreme Court decision of *O'Malley* v. *Hankins*, 207 Ind. 589, 194 N. E. 168 (1935). In that case the trial court appointed an Indiana Receiver to conduct the local affairs of a Missouri insurance company that had been placed into liquidation by a Missouri court. In reversing the trial court, the Supreme Court of Indiana said:

"If the Courts of Indiana may equitably take posssession of the assets of a company within Indiana for the benefit of the Indiana creditors, why cannot the Courts of Missouri or the Insurance Commissioner of that state, take possession

> of the assets of a company (which we assume to be the principal assets) located in the State of Missouri for the benefit of the Missouri policyholders and creditors? Such a procedure would manifestly work an injustice upon and injury to Indiana policyholders and creditors." (194 N. E. 168 at 177.)

The cited language from *O'Malley* v. *Hankins, supra*, overtly demonstrates the incorrectness of Petitioner's statement, which appears on page 13 of its brief.

> "In doing so, the Court of Appeals interprets the Indiana statute to accord with the public policy of the State of Illinois, another state within the circuit, rather than in accord with what appears to be the public policy of the State of Indiana."

This statement will not stand scrutiny. As discussed beforehand, the Court of Appeals did not give § 4307 such a restricted meaning as to reasonably allow one to conclude that the Court of Appeals abused its discretion. Conversely, the Court of Appeals reasoned that the public policies of Illinois and Indiana are identical with respect to the grant of preference to domiciliary creditors.

Applicant respectfully submits that the Court of Appeals approached the issues respecting the construction of § 4307 with demonstrable diligence, analysis and judiciousness; therefore, the Writ should be denied.

II.

IT CANNOT BE PROPERLY INFERRED THAT THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT CONSIDER THE UTILIZATION OF CERTIFICATION PROCEDURES UNDER INDIANA APPELLATE RULE 15(N).

Petitioner asserts that the Court of Appeals abused its discretion because it did not consider the use of available state certification procedures. The following statement appears at page 12 of Petitioner's Brief:

> "Although Delphi requested the Court of Appeals on appeal and as a basis for rehearing to utilize the certification procedures available under the Indiana Appellate Court Rules, *the Court of Appeals refused to even consider such a procedure in rendering its decisions.*" (Emphasis supplied.)

Implicit in Petitioner's argument that the Court of Appeals failed to consider the question of certification is the concomitant argument that the Court of Appeals should have addressed itself to that issue in its opinion. Such is not the case. When a point of law is briefed on appeal, argued in oral argument and presented again on petition for rehearing, it will be presumed that the court considered those points presented, even though its opinion is silent regarding them. Petitioner's assumption that the Court of Appeals failed to consider its request for certification pursuant to Indiana Appellate Rule 15(N) is erroneous. In *Bingham* v. *United States*, 296 U. S. 211, 56 S. Ct. 180, 80 L. Ed. 160 (1935), this Court held that matters briefed and presented to a court shall be deemed to have been considered by the court even though the court's opinion was silent. In *Commonwealth of Pennsylvania* v. *Brown*, 373 F. 2d 771, 777 (3rd Circuit 1967), the Court relied upon *Bingham* v. *United States*, *supra*, and stated:

> "It is settled, too, that matters pertinent to an issue before a court and which were clearly presented to it, by brief or appendix thereto, are to be taken as covered by the court's decision *though not mentioned in the opinion.*
>
> • • • • •
>
> "It has been specifically held that where a state statute is referred to and discussed in briefs, its consideration by the court must be assumed, although it was not referred to in the court's opinion."

Thus, as Applicant has demonstrated, Petitioner's position that silence can be equated to non-consideration of a point is not well taken. The lack of commentary does not infer a lack of consideration.

III.

RIGHTS CONFERRED BY A STATUTE CANNOT BE INVOKED BY ONE WHO DID NOT COMPLY WITH THE REQUIREMENTS OF THE STATUTE.

Petitioner seeks to impose liability against the Reinsurers pursuant to the provisions of § 4307, the pertinent provisions of which provide:

> "No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one (1) fidelity or surety risk or hazard in an amount exceeding ten per cent (10%) of its capital, surplus and contingent reserves, if any, unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured *jointly* with such reinsurer *and upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment* . . ." (Pet. Br. pp. 3-4) (Emphasis supplied.)

The Court of Appeals specifically held that § 4307 requires that the Reinsurers be joined with the Reinsured under the plain terms of the statute. (Pet. Br. Appendix-A8) In making an analysis of the Indiana liquidation statutes, the Court of Appeals reached the following conclusion:

> "Since Section 4307 *specifies that the reinsurer be sued jointly with the insurer,* Section 3410 would prevent any suit under an agreement minimally complying with Section 4307, once Indiana liquidation proceedings had begun." (Emphasis supplied.)

Petitioner did not join the insolvent insurance company, or its successor in interest, the Liquidator; therefore, Petitioner has not brought itself within the terms of the statute under which it seeks relief. When one seeks a statutory remedy, it is

well settled that such person must bring himself strictly within the requirements of the statute. The remedy created by § 4307, the right to sue the reinsurer and the reinsured prior to commencement of insolvency proceedings against the reinsured, did not exist at common law. Reinsurance agreements have traditionally been construed as pure contracts of indemnity and do not give rise to third party beneficiary rights. The Indiana Court of Appeals recently commented upon this point in *State of Florida ex rel. O'Malley* v. *Department of Insurance*, ... Ind. App. ....., 291 N. E. 2d 907, 913 (1973):

> "The reinsurance contract is primarily one of indemnity *to the reinsured only*, not against loss by the hazards specified in the original policy, but against loss or liability by virtue of the original contracts of insurance . . ." (Emphasis supplied.)

Since the remedy sought by Petitioner is one created solely by statute and not known to the common law, it is incumbent upon Petitioner to bring itself within the requirements of the statute. The failure to do so is fatal and Petitioner has no standing to seek the instant Writ.

In *United States ex rel. Texas Portland Cement Company* v. *McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (1914), an action brought by materialmen under a Federal statute, this Court stated at page 162 of 233 U. S.:

> "The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

Indiana has also followed the same rule. In *State ex rel. Wever* v. *Reeves et al*, 229 Ind. 164, 96 N. E. 2d 268 (1951), an election recount case, the Supreme Court of Indiana at pp. 270-71 of 96 N. E. 2d stated:

> "It is a well settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions."

Judge Eschbach aptly summarized Applicant's position in the Memorandum of Decision and Order, (Pet. Br. Appendix A—11, 14):

> "The Indiana statute in question clearly does contemplate an action by the insured against the reinsurer, but it is equally clear from the language of that statute that such action is to be *jointly* with the company reinsured. This conclusion is supported not only by the language of the statute itself, but by the recognition in the statute that *judgment must first be had by the insured against the reinsured, and then only may the insured recover against such reinsurer.* This recognition reaffirms the original proposition that a contract of reinsurance is basically one of indemnity, and *the reinsurer's liability only results from a loss incurred by the reinsured.*" (Emphasis supplied in part.)

For the foregoing reasons, Petitioner has no standing to seek a Writ before this Court in view of the obvious non-compliance with § 4307.

IV.

THE QUESTION OF WHETHER THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT FAILED TO APPLY RULE 19 IN ALLEGED CONTRAVENTION OF THE DECISION OF THIS COURT IN PROVIDENT TRADESMENS BANK AND TRUST CO. v. PATTERSON IS PREMATURE AND DOES NOT PRESENT A JUSTICIABLE ISSUE FOR CONSIDERATION BY THIS COURT.

Petitioner contends that the Court of Appeals ignored an alleged "conflict" between the decisions of the District Court and of the Court of Appeals with the decision of this Court in *Provident Tradesmens Bank and Trust Co.* v. *Patterson,* 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) with respect

to whether the Liquidator was an indispensable party under Federal Rule 19. (Pet. Br. p. 16) Petitioner's contention with respect to the District Court's decision is treated in Argument V herein.

There is no conflict between the decision of the Court of Appeals and this Court's decision in *Provident* because the Court of Appeals decided that Petitioner's § 4307 rights did not survive the insolvency of the Reinsured. The Court of Appeals stated:

> "Our determination that there is no preference leads to the conclusion that *the direct cause of action does not survive the commencement of liquidation proceedings.*" (Emphasis supplied) (Pet. Br. Appendix A9)

Since Petitioner's § 4307 rights did not survive the insolvency of the reinsured, Petitioner's argument that the Liquidator is not an indispensable party under Federal Rule 19 is premature and moot. In order for Petitioner's argument to be "ripe", this Court would have to vacate and remand the case to the Court of Appeals; the Court of Appeals would have to decide to certify the controlling question of state law to the Supreme Court of Indiana and the Supreme Court of Indiana would have to decide that Petitioner's § 4307 rights did survive the insolvency of the reinsured.

An argument which is premature does not present a justiciable issue for consideration by this Court. This Court has held in a series of decisions dating back to the landmark case of *Commonwealth of Massachusetts* v. *Mellon*, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923), that an issue must present a justiciable controversy before the Court will consider it. This principle was recently restated in *Laird* v. *Tatum*, 408 U. S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), a case involving the question of whether army surveillance of alleged lawful and peaceful civilian activity was constitutionally permissible. Mr. Chief Justice Burger held in *Laird* that Respon-

dent failed to demonstrate a justiciable controversy because there was no showing that any specific action had been taken by the army against Respondent. Again, in *Poe* v. *Ullman*, 367 U. S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), this Court refused to pass upon the constitutionality of a Connecticut statute which prohibited the usage of contraceptives on the ground that the statute had never been enforced and that petitioner's fears that it might be enforced against him did not present a justiciable issue. Mr. Justice Frankfurter stated at pp. 508-509 of 367 U. S.:

> "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issue for decision by this Court and the actual hardship to the litigants of denying them the relief sought."

Although questions of justiciability and its sub-parts of prematureness, mootness and standing, usually arise in constitutional cases, the underlying policy of the Court respecting those issues should be applied to the instant case. Applicant respectfully submits that this Court need not pass upon the Rule 19 question raised by Petitioner in light of the decision of the Court of Appeals that the "direct rights" asserted against the Respondents abated upon commencement of insolvency proceedings against the Reinsured.

V.

THE FEDERAL DISTRICT COURT'S ORDER OF DISMISSAL WAS BASED UPON THE FACTORS ANNOUNCED BY THIS COURT IN PROVIDENT TRADESMENS BANK & TRUST CO. v. PATTERSON.

Applicant has previously demonstrated in Argument IV that the Court of Appeal's affirmance of the District Court's Order of Dismissal was essentially based on different grounds than those stated by the District Court. Notwithstanding that such

is the case, Petitioner argues that the District Court did not consider those factors identified in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra* with respect to the issue of whether the Liquidator of the Reinsured was an indispensable party pursuant to Rule 19.

The District Court's Order of Dismissal, which dismissed Petitioner's Complaint against the Reinsurers without prejudice, was entered after the respective parties had thoroughly briefed the questions presented, including Petitioner's argument that the *Provident* factors must be applied in determining whether the Liquidator was an indispensable party under Rule 19(b). Applicant represents to the Court that Petitioner devoted a portion of its Brief In Opposition To Defendant's Motion to Dismiss to the Rule 19 issue.

It cannot be inferred that the District Court did not consider and apply the *Provident* factors pertaining to indispensability simply because the Court's opinion did not reiterate those considerations, point by point, in its Memorandum Decision. Applicant's position respecting the silence of the Court of Appeal's decision on the question of certification is equally applicable to the District Court's Order of Dismissal. The alleged failure of a court to consider a question cannot be inferred from the absence of commentary. *Bingham* v. *United States, supra; Commonwealth of Pennsylvania* v. *Brown, supra.*

A careful analysis of the District Court's Memorandum of Decision and Order clearly indicates that Judge Eschbach *did apply the Provident factors* to the Rule 19 issue. A summarization of the *Provident* factors and considerations is as follows:

(1) The Plaintiff's interest in the forum;

(2) The Defendant's interest in avoiding multiple litigation or inconsistent relief;

(3) The interest of the non-joined party;

(4) The interest of the Court and the public in totally and finally resolving the issue; and

(5) The interest of the Court in formulating a judgment which will accommodate all of the preceding interests.

Applicant respectfully submits that the District Court's Order of Dismissal did, in fact, accommodate and consider the interests outlined above. Clear and unambiguous statements are found in the District Court's Memorandum of Decision and Order which substantiate Applicant's position. The Court's attention is respectfully directed to the statements of Judge Eschbach contained in his memorandum opinion (Pet. Br. Appendix A11-18), which clearly indicates an appreciation and consideration of the *Provident*—Rule 19 criterion:

> (1) The District Court considered the substantive rights of the parties contained in § 4307 to the effect that a joint action against the Reinsurers and Reinsured was necessary because the statute obviously requires that the bond obligee must first obtain a judgment against the reinsured before proceeding against the reinsurer. The District Court stated:
>
> > "It is difficult to perceive how the reinsurer here can become liable on the Bond when there has been no judicial or other determination that the reinsured is liable." (Pet. Br. Appendix A14)
>
> (2) Recognition was specifically given to the paramount rule of law that reinsurance proceeds are assets of the Liquidator for the use and benefit of the general creditors of the insolvent reinsured and that the Order of Liquidation issued by the Illinois Court had specified that the ". . . Liquidator has the right, title and interest in all funds receivable under treaties and agreements of reinsurance. . . ." (Pet. Br. Appendix A15)
>
> (3) The District Court alluded to the fact that even if § 4307 did create a preference, Petitioner had failed to show that the Liquidation Court in Illinois would not respect such a preference, if it existed. (Pet. Br. Appendix A15)
>
> (4) The determination of the Petitioner's interest in the reinsurance proceeds, in the absence of the Liquidator, would clearly be prejudicial to the rights of the Liquidator and the remaining creditors of Home Owners. (Pet. Br. Appendix A15)

(5) The Court examined the effect of the Illinois anti-suit injunction issued prior to the commencement of the proceedings in the District Court and concluded that the District Court could proceed despite the injunction; however, respect was given to the injunction on principles of comity previously recognized in the Seventh Circuit Decisions of *Thacher* v. *H. C. Baldwin Agency, Inc.*, 283 Fed. 2d 857 (7th Cir.—1960) and *Janak* v. *Allstate Insurance Company*, 319 F. Supp. 215 (U. S. D. C. Wisc. —1970). The District Court further concluded that the policy of Indiana was the same as the policy announced in *Thacher* v. *H. C. Baldwin Agency, Inc., supra;* and *Janak* v. *Allstate Insurance Company, supra.*

Judge Eschbach further recognized that sound policy considerations militated in favor of deferment of jurisdiction because (a) the Liquidator would be forced to litigate issues in foreign forums thereby diminishing the assets available for general creditors; (b) the Liquidator may be exposed to inconsistent judgments, and (c) Petitioner had made no showing that it would be prejudiced if it were relegated to the insolvency proceedings. (Pet. Br. Appendix A17-18)

Based upon the foregoing, it is quite clear that the District Court did, in fact and in law, apply the *Provident*—Rule 19 factors in determining that the Liquidator was an indispensable party and that the proceedings should not go forward in his absence.

CONCLUSION.

This Court should not issue a writ of certiorari for the review of the decision of the Court of Appeals for the Seventh Circuit.

In the instant case, an Indiana statute was interpreted by "local jurists" trained and experienced in Indiana law. This fact alone distinguishes the instant case from this Court's decision in *Lehman Brothers* v. *Schein, supra,* wherein the lower court's judgment was vacated and remanded for reconsideration

as to whether the issue of the controlling Florida law should be certified to the Florida Supreme Court. Unlike the instant case, *Lehman Brothers* v. *Schein, supra,* involved a decision by New York jurists, not trained and experienced in Florida law, concerning the application and extension of the substantive law of New York to an issue which the New York jurists believed would "most probably" be followed by the Supreme Court of Florida if confronted with the same issue. The instant case does not involve a situation where "novel" questions of law have been decided by what this Court referenced as "outsiders" in *Lehman Brothers.* Furthermore, there is no substance to Petitioner's argument that an abuse of discretion occurred in the Court of Appeals simply because that Court did not specifically delineate its reasons for not utilizing state certification procedures. To the contrary, it will be presumed that a court did consider a question when the same has been briefed on appeal, presented in oral argument and re-briefed on Petition for Rehearing.

Petitioner has no standing to request a review of the lower court's decision when the remedy it seeks to enforce is conferred by statute and it is obvious that the procedural and substantive requirements of that statute have not been met. The language of § 4307 requires that an action be maintained jointly against the reinsured and the reinsurer by the bond obligee and this conclusion is supported by the further requirement of the statute that the bond obligee first obtain judgment against the reinsured prior to proceeding against the reinsurer.

Petitioner has faild to present a justiciable issue for consideration by this Court because the decision of the Court of Appeals for the Seventh Circuit rendered moot and premature Petitioner's argument that the Liquidator was not an indispensable party under Rule 19. Once the Court of Appeals had decided that Petitioner's "direct rights" had abated at the time of the commencement of insolvency proceedings against the reinsured, the question of whether the Liquidator was or was not

an indispensable party became moot. Once the "direct rights" had dissolved because of the commencement of liquidation proceedings against the reinsured, the remedy also dissolved. There can be no conflict between the decision of the Court of Appeals and the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson* since the Court of Appeals did not have to reach the Rule 19 issue.

A careful analysis and scrutiny of the Memorandum of Decision and Order issued by the United States District Court for the Northern District of Indiana discloses that the trial judge did, in fact and in law, apply the Rule 19 factors, as interpreted in *Provident,* to the issue of whether the statutory Liquidator of the reinsured was an indispensible party under Rule 19. The inquiry made by the trial judge unquestionably considered the substantive, procedural and pragmatic reasons for not allowing the litigation to proceed in the absence of the Liquidator.

For these reasons, this Court should not issue a writ of certiorari for the review of the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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